

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN HARDGES,

Defendant-Appellant.

UNPUBLISHED
February 21, 2012

No. 293334
Wayne Circuit Court
LC No. 08-012075-FH

Before: SERVITTO, P.J., and TALBOT and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of using a computer for the purpose of committing third-degree criminal sexual conduct or child sexually abusive activity, MCL 750.145d(2)(f), child sexually abusive activity, MCL 750.145c(2), and using a computer for the purpose of accosting or soliciting a minor for immoral purposes, MCL 750.145d(2)(d). He was sentenced to concurrent prison terms of 57 months to 20 years each for the first two convictions, and 57 months to 10 years for the latter conviction. We affirm.

In his original brief on appeal, defendant raised claims of instructional error wherein he argued that the trial court failed to instruct the jury on essential elements of the charged offenses. After defendant filed his brief, this Court granted the prosecutor's motion to remand to correct the record. *People v Hardges*, unpublished order of the Court of Appeals, entered November 19, 2010 (Docket No. 293334). Following several hearings on remand, the trial court adopted an amended transcript of the jury instructions, which included instructions on the elements of the charged offenses. The parties also agreed that in light of the errors and omissions in the jury instruction portion of the original transcript, the entire trial transcript should be re-transcribed by a different court reporter. However, other court reporters were unable to complete an official record from the original reporter's steno notes.

In a reply brief filed after the remand proceedings, defendant now agrees that the jury instructions as shown in the amended transcript confirms that the trial court correctly instructed the jury on the elements of the charged offenses, and "thus effectively eliminates the factual basis for the two issues raised in his initial Brief on Appeal." However, defendant also argues that in light of the manifest errors in the original transcript of the jury instructions, the transcript of the remainder of the trial is likely to be similarly flawed. He asserts that a complete transcript

is essential to his constitutional right to appeal and his right to the assistance of counsel in that appeal.

Initially, as a procedural matter, defendant's attempt to raise this new argument in a reply brief is contrary to MCR 7.212(G), which states that "[r]eply briefs must be confined to rebuttal of the arguments in the appellee's or cross-appellee's brief[.]" Furthermore, even if defendant's argument is considered, defendant has not established entitlement to relief.

In *People v Federico*, 146 Mich App 776, 799-800; 381 NW2d 819 (1985), this Court explained:

The inability to obtain the transcripts of a criminal proceeding may impede a defendant's right to appeal to an extent that a new trial must be ordered. *People v Frechette*, 380 Mich 64, 73; 155 NW2d 830 (1968); *People v Horton (After Remand)*, 105 Mich App 329, 331; 306 NW2d 500 (1981). Where only a portion of the trial transcript is missing, the surviving record must be reviewed in terms of whether it is sufficient to allow evaluation of defendant's claim on appeal. The sufficiency of the record depends on the questions that must be asked of it. *People v Audison*, 126 Mich App 829, 834-835; 338 NW2d 235 (1983).

See also *Mayer v Chicago*, 404 US 189, 194; 92 S Ct 410; 30 L Ed 2d 372 (1971).

Defendant relies on *People v Abdella*, 200 Mich App 473, 476; 505 NW2d 18 (1993), in which this Court stated that in order

to overcome the presumption of the accuracy [of a transcript] and be entitled to relief, a petitioner must satisfy the following requirements: (1) seasonably seek relief; (2) assert with specificity the alleged inaccuracy; (3) provide some independent corroboration of the asserted inaccuracy; and (4) describe how the claimed inaccuracy in transcription has adversely affected the ability to secure postconviction relief pursuant to subchapters 7.200 and 7.200 of our court rules.

This Court observed that a defendant may provide independent corroboration of an asserted inaccuracy by submitting "affidavits of witnesses, trial spectators, police officers, court personnel, or attorneys," or through "references to police reports or preliminary examination transcripts, or perhaps to trial circumstances that demonstrate the position of the petitioner, such as noting that if the witness whose testimony is claimed to have been transcribed inaccurately had actually testified as transcribed, then the final arguments would have been different." *Id.* at 476 n 2.

In this case, transcription error is manifest from a comparison of the original and amended transcript of the jury instructions. But that defect has been remedied by the amended transcript. Defendant has not asserted with specificity any other inaccuracy in the transcript of the remainder of the trial, much less provided support for any alleged inaccuracy or an explanation of how it affects his ability to secure relief on appeal. Defendant's mere uncertainty about the accuracy of the transcript, without any independent corroboration that any specific portion of the remaining transcript appears to be inaccurate, is insufficient to obtain relief under *Abdella*.

Defendant alternatively requests that this Court remand this case “for an attempt to settle the entire record, under MCR 7.210.” However, because defendant has not asserted any alleged inaccuracy with specificity, or submitted any affidavit or other offer of proof in support of the existence of any specified inaccuracy, he has not demonstrated that a remand is necessary. See MCR 7.211(C)(1)(a).

Defendant also asks that if this Court does not grant a new trial or remand for an attempt to settle the entire record, it should find that the amended transcript of the jury instructions “being only 75 to 80% accurate at best,” is not an adequate substitute for the original version and reverse the trial court’s decision to substitute the amended version for the original version. However, defendant did not argue before the trial court on remand that the amended transcript should be rejected because of uncertainty concerning its accuracy. Instead, he only argued that the discrepancies between the original and amended transcripts of the jury instructions warranted re-transcription of the remaining trial transcript. Because the parties were in agreement, the trial court relied on their stipulation concerning the testimony that would have been presented and did not further evaluate the propriety of adopting the amended transcript. Defendant may not now obtain relief on the basis that the trial court erred in following the course of action that the parties suggested. Counsel cannot harbor error as an appellate parachute. *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991).

Affirmed.

/s/ Deborah A. Servitto
/s/ Michael J. Talbot
/s/ Kirsten Frank Kelly